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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA,  
SAN FRANCISCO DIVISION

SONOS, INC.,  
Plaintiff and Counter-Defendant,  
v.  
GOOGLE LLC,  
Defendant and Counter-Claimant.

Case No. 3:20-cv-06754-WHA  
Consolidated with Case No. 3:21-cv-07559-  
WHA

**SONOS, INC.'S PROFFER OF  
TESTIMONY OF ALAINA KWASIZUR**

Judge: Hon. William Alsup  
Courtroom: 12, 19th Floor  
Trial Date: May 8, 2023

1           **I. INTRODUCTION**

2           Sonos submits this proffer of the testimony of Alaina Kwasizur, reflecting the direct  
3 examination testimony that Ms. Kwasizur would have offered, including the exhibits she would  
4 have authenticated and discussed, had the Court not precluded this testimony through its rulings  
5 at the pretrial conference, during trial, and at summary judgment.

6           Prior to trial, the Court ruled as a matter of law that the filing of a complaint could not  
7 trigger knowledge for purposes of finding willfulness or indirect infringement. Case No. 3:21-cv-  
8 07559-WHA, Dkt. 156 at 7-8, 11.

9           At the final pretrial conference, the Court also ruled that Sonos could not put in evidence  
10 the communications Sonos sent Google putting it on notice that Google infringes the Sonos  
11 patents-in-suit without “opening the door” to Google discussing what happened to the four  
12 patents mentioned in that correspondence which are no longer in the case. The Court further  
13 ruled that Sonos would be deemed to have opened the door to Google discussing these other  
14 patents even if it redacted them from the relevant communications. 5/3/23 Tr. at 104:11-14. And  
15 the Court also ruled during trial that Sonos would be deemed to have opened the door to Google  
16 discussing the disposition of these other patents if Ms. Kwasizur *mentioned* that Sonos had  
17 provided Google with pre-suit notice – even if Sonos did not seek to introduce any document that  
18 mentioned those other patents. 5/8/23 Tr. at 175:6-177:21. The Court noted, however, that if  
19 Sonos had a cease and desist letter that only mentioned the remaining patents in suit, it could  
20 introduce that without opening the door. 5/3/23 Tr. at 56:12-13, 58:25-59:2. The Court also  
21 ruled that Sonos could not introduce any evidence from the parties’ licensing negotiation to prove  
22 Google’s state of mind (a permissible use of settlement communications under FRE 408) because  
23 those communications created unfair prejudice under FRE 403, 5/3/23 Tr. at 59:8-22, and ruled  
24 during trial that Sonos could not introduce any evidence (of any kind) that Google knew about  
25 other patents in the same family of the patents in suit to support its willful blindness theory.  
26 5/8/23 Tr. at 180:18-25.

27           Taken together, we understand the Court’s ruling to be that (i) the only proper way for  
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1 Sonos to give notice was to send cease and desist letters outside the settlement context (although  
 2 it is not clear how or why they could be admitted without opening the door if, as the Court has  
 3 found, a draft complaint mentioning other patents cannot be admitted without opening the door<sup>1</sup>)  
 4 and (ii) that willful blindness cannot be supported by evidence that a defendant knew about the  
 5 patent family at issue and knew that additional patents were being prosecuted under that family.  
 6 Sonos respectfully believes that these rulings are in error and therefore submits this proffer as to  
 7 the testimony it would have introduced if the Court had not so ruled.

## 8 **II. STATEMENT OF RELEVANT FACTS**

9 At the final pretrial conference, Sonos noted its plan to introduce evidence at trial  
 10 regarding “the fact that Sonos has provided Google, in the course of their negotiations, with  
 11 patent charts and assertions and knowledge of Google’s infringement of more than a hundred  
 12 patents.” Sonos explained that this evidence “goes to a willful blindness theory that shows  
 13 Google’s pattern of knowing about Sonos’ intellectual property, knowing about Google’s  
 14 infringement of that intellectual property, and disregarding it.” 5/3/23 Tr. at 55:6-19. The Court  
 15 ruled that Sonos would not be permitted to “put in hundreds of patents” as part of Sonos’s  
 16 willfulness or willful blindness case. *Id.* at 56:12-15. The Court instructed that Sonos was “not  
 17 going to get off in some donnybrook about all these other patents and all these other products. No  
 18 way.” *Id.* at 56:21-22. The Court also ruled that Sonos would not be permitted to introduce  
 19 evidence of the claim charts that Sonos provided Google in the context of negotiations. *Id.* at  
 20 58:17-24. The Court held that “anything that deals with these negotiations, pointing the finger at  
 21 who walked away, there was a term sheet, that’ll take two days to try, and it doesn’t prove very  
 22 much. So under Rule 403, all of that is excluded.” *Id.* at 59:15-18. Sonos’s counsel attempted to  
 23 explain the relevance of this evidence, and the Court noted “I have made my ruling. All of this is  
 24 out ....” *Id.* at 59:3-22.

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25 <sup>1</sup> Perhaps the Court is of the view that the only proper way to give notice is to send cease and  
 26 desist letters each of which mention an individual patent so that, in the event some patents are  
 27 later found invalid or withdrawn, a letter can be introduced that does not mention other  
 28 patents without any redactions. But even if this is the case, it is not clear why that also would  
 not open the door under the Court’s reasoning and ruling regarding Ms. Kwasizur’s oral  
 testimony because the defendant could claim that given the letter the plaintiff has opened the  
 door to the entire notice process.

1 The Court also ruled that Sonos would be deemed to have opened the door to Google  
 2 discussing the disposition of these other patents if Ms. Kwasizur testified orally that Sonos had  
 3 provided Google with pre-suit notice – even if Sonos did not seek to introduce any document that  
 4 mentioned those other patents. 5/8/23 Tr. at 175:6-177:21. Similarly, the Court ruled that Sonos  
 5 could not introduce any evidence (of any kind) that Google knew about other patents in the same  
 6 family of the patents in suit to support its willful blindness theory. 5/8/23 Tr. at 180:18-25.

7 Previously, at the second stage of summary judgment, the Court granted Google’s motion  
 8 for summary judgment of no willful or indirect infringement of the ’885 patent, holding that  
 9 “Google has shown that there are no genuine disputes of material fact as to whether it committed  
 10 willful or indirect infringement of the ’885 patent.” Dkt. 566 at 29-31. Prior to that ruling, Sonos  
 11 planned to introduce much of the same evidence at trial regarding Google’s knowledge of and/or  
 12 willful blindness to its infringement of the ’885 patent.

### 13 **III. OVERVIEW OF PROFFER**

14 As described in the attached Declaration of Alaina Kwasizur, Ms. Kwasizur would have  
 15 testified regarding Sonos’s repeated communications to Google regarding Google’s infringement  
 16 of Sonos’s patent portfolio. As Ms. Kwasizur would have testified, Sonos put Google on notice  
 17 of Google’s infringement beginning in 2016, shortly after Google’s initial competing products  
 18 came onto the market. *See, e.g.*, Kwasizur Decl. ¶ 4. Sonos continued to notify Google of  
 19 infringement during the period 2016 to 2020. Sonos provided Google with multiple detailed  
 20 presentations and letters, as well as claim charts for hundreds of Sonos patents. *Id.* ¶¶ 4-29. This  
 21 notice also included repeated communications to Google regarding Google’s infringement of  
 22 patents in the zone scene patent family—i.e., patents that have the same specification as both of  
 23 the asserted patents in this case. *Id.* ¶¶ 7-15, 17-21, 25-29.

24 For example, in September 2016, Sonos sent Google an email summarizing an August  
 25 2016 meeting between the parties and attaching a document summarizing a number of Sonos  
 26 patents that Sonos identified as being relevant to Google’s competing products. *Id.* ¶ 5. That  
 27 document identifies, as one of several patents relevant to Google, Sonos’s Patent No. 8,483,853  
 28 (“the ’853 patent”). *Id.* ¶ 8. The ’853 patent is the first issued patent in the zone scene patent

1 family at issue in this case. *Id.* It is the ultimate parent patent to both patents in the trial and all  
2 share a substantively identical specification. *Id.*; *see also, e.g., id.* ¶¶ 9-10. Sonos highlighted the  
3 '853 patent to Google again in an October 2016 email. *Id.* ¶¶ 12-13. And at an October 25, 2016  
4 in-person meeting between Sonos and Google, Sonos showed Google another example indicating  
5 to Google the relevance of the zone scene patent family—including U.S. Pat. No. 8,843,228 (“the  
6 '228 patent”), which is the child application to the '853 patent and the great grandparent to the  
7 '966 and '885 patents. *Id.* ¶¶ 12, 14-15. Sonos highlighted the '228 patent to Google *again* at a  
8 presentation that Sonos gave to Google in January 2018, with a detailed explanation of how  
9 Google’s products practiced the '228 zone scene patent, including both the ability to create zone  
10 scenes and the invoking of those zone scenes using Google’s app. *Id.* ¶ 17. Sonos also put  
11 Google on notice of its infringement of the '228 zone scene patent in February 2019, by providing  
12 a claim chart illustrating Google’s infringement of this patent. *Id.* ¶¶ 18-19. Sonos highlighted  
13 Google’s infringement of the '228 zone scene patent, as well as Sonos’s zone scene patent family  
14 more broadly, to Google yet again in a June 2019 presentation and email. *Id.* ¶¶ 20-21.

15 In addition to putting Google on notice of infringement of multiple patents in the zone  
16 scene patent family, Sonos also put Google on notice that Sonos “keeps the patent families alive,”  
17 which means that Sonos typically files additional child applications based on their existing patent  
18 applications. *Id.* ¶¶ 6-7, 11, 27. This statement, combined with Sonos’s notice of Google’s  
19 infringement of earlier patents in the same family, put Google on notice that additional patents in  
20 each family—including the zone scene patent family—would be filed and that Google needed to  
21 be aware of those patents in order to monitor for infringement.

22 Ms. Kwasizur would have testified that because Sonos has been identifying zone scene  
23 patents to Google since 2016, including providing detailed presentations on Sonos’s zone scene  
24 patent family and Google’s infringement thereof, and told Google that Sonos keeps patent  
25 families alive, Google was on notice to check and see when the Patent Office issued new patents  
26 to Sonos, particularly in the zone scene family. Thus, the only way Google would not have  
27 known about the '966 patent prior to Sonos’s suit (or, with respect to the '885 patent, prior to  
28 issuance or to Sonos’s provision of a claim chart in January 2021) was if Google willfully blinded

1 itself to these new patents. Had Google checked, it would have found the '966 patent as early as  
 2 its issue date, which was November 5, 2019, and it would have found the '885 patent as early as  
 3 its issue date, which was November 24, 2020. Instead, Google contends in this case that it did not  
 4 become aware of the '966 patent until September 28, 2020. In light of Google's admitted  
 5 knowledge of the '966 patent as of September 28, 2020, the only way Google would not have  
 6 known about the '885 patent—which Google itself describes as the other side of the coin from the  
 7 '966 patent—was if it purposefully didn't check for these new patents. Google also would have  
 8 known that its own acts infringed Sonos's '966 and '885 patents, because the inventions claimed  
 9 in those patents are described in the specification Google was aware of for years.

10 Sonos therefore maintains that Ms. Kwazisur's testimony is relevant to and probative of  
 11 Google's knowledge of the '966 and '885 patents, Google's knowledge of infringement of those  
 12 patents, or Google's willful blindness to both those patents and its infringement, all for purposes  
 13 of establishing the "knowledge" element of willful and indirect infringement.

14 As a general matter, "[k]nowledge of infringement and specific intent may be inferred  
 15 from circumstantial evidence." Dkt. 566 at 30 (citing *Warsaw Orthopedic, Inc. v. NuVasive, Inc.*,  
 16 824 F.3d 1344, 1347 (Fed. Cir. 2016)); *see also, e.g., Intel Corp. Inv. Pol'y Comm. v. Sulyma*,  
 17 140 S. Ct. 768, 779 (2020) ("actual knowledge can be proved through 'inference from  
 18 circumstantial evidence'" (citation omitted)). As the Supreme Court has repeatedly recognized,  
 19 actual knowledge can also be established by showing willful blindness. *See id.*; *see also*  
 20 *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 948 (2022) ("We have  
 21 recognized in civil cases that willful blindness may support a finding of actual knowledge."). So,  
 22 at a minimum, the testimony described in this proffer is relevant to Sonos's claim that Google  
 23 was willfully blind to its infringement of the asserted patents. *See Glob.-Tech Appliances, Inc. v.*  
 24 *SEB S.A.*, 563 U.S. 754, 766 (2011); *Corephotonics, Ltd. v. Apple, Inc.*, No. 17-CV-06457-LHK,  
 25 2018 WL 4772340, at \*9 (N.D. Cal. Oct. 1, 2018).

26 The Federal Circuit has made clear that under the willful blindness totality of  
 27 circumstances standard, an alleged infringer's knowledge of related patents is relevant to  
 28 knowledge of infringement of the asserted patent in question. For example, the Federal Circuit

1 concluded that the ITC had “adequate evidence” to find willful blindness of infringement of the  
 2 ’344 patent where the alleged indirect infringer “was well-aware of competitor products, of Cross  
 3 Match’s prominence in the fingerprint scanner market, and of Cross Match’s relevant ’562  
 4 patent.” *Suprema, Inc. v. Int’l Trade Comm’n*, 626 F. App’x 273, 280-81 (Fed. Cir. 2015). The  
 5 Court noted that “Suprema specifically studied the ’562 patent, which incorporates by reference  
 6 in four portions of its specification the patent application (U.S. Patent Ser. No. 10/345,420) that  
 7 led to the ’344 patent.” *Id.* at 281. The Court described the ITC’s conclusion that “because the  
 8 ’562 and ’344 patents have overlapping inventors and share the same assignee, Cross Match, ‘a  
 9 word search likely would have identified both patents.’” *Id.* (citation omitted). And the Court  
 10 noted that “had Suprema checked for the issuance of the ’344 patent at the time it was reviewing  
 11 the ’562 patent, Suprema would have undoubtedly discovered that the ’344 patent had issued.”  
 12 *Id.* Accordingly, “given the similarities in content, inventorship, and ownership between the ’344  
 13 and ’562 patents, and the facts that Suprema studied the ’562 patent during its extensive market  
 14 analysis, was aware of Cross Match’s activities in the scanner field, and specifically targeted the  
 15 market Cross Match serviced when developing its own products,” the Court concluded that under  
 16 the totality of the circumstances, the ITC had adequate evidence to find willful blindness. *Id.*

17 Other courts have concluded under similar factual circumstances that “[a] reasonable jury  
 18 could find that [the alleged infringer] had pre-suit knowledge of the ’234 patent because it knew  
 19 of the ’226 and ’325 patents, which are in the same patent family as the ’234 patent, as well as  
 20 other patent applications in the same family.” *Kewazinga Corp. v. Microsoft Corp.*, 558 F. Supp.  
 21 3d 90, 119-20 (S.D.N.Y. 2021), *reconsideration denied*, No. 1:18-CV-4500-GHW, 2022 WL  
 22 4236301 (S.D.N.Y. Sept. 14, 2022). In *Kewazinga*, as here, “the parties met and communicated  
 23 about [the alleged infringer’s] alleged infringement of those patents” in the same family. *Id.* And  
 24 “[w]hile this evidence does not establish knowledge of the ’234 patent itself, ‘[e]vidence of pre-  
 25 suit knowledge of a patent can be circumstantial’ and a reasonable factfinder could infer that [the  
 26 alleged infringer] was aware of the ’234 patent based on its actual knowledge of patents in the  
 27 same family, including the ’226 and ’325 patents.” *Id.* (citation omitted); *see also, e.g., Sunoco*  
 28 *Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. CV 17-1390-RGA, 2022



1 WL 3973479, at \*7-8 (D. Del. Aug. 31, 2022) (denying defendants’ motion for JMOL of no  
 2 willful infringement for the ’686 patent where defendant had knowledge of the ’671 patent, which  
 3 “has the same specification as and similar claims to the” ’686 patent).

4 Sonos acknowledges that this Court, and some other district courts, “have held that  
 5 *general* knowledge of a patent portfolio is insufficient to support willfulness.” *Illumina, Inc. v.*  
 6 *BGI Genomics Co.*, No. 19-CV-03770-WHO, 2022 WL 899421, at \*13 (N.D. Cal. Mar. 27, 2022)  
 7 (collecting cases) (emphasis added). But “the Federal Circuit has cast significant doubt on that  
 8 authority.” *Id.* at \*14 (quoting *SiOnyx, LLC v. Hamamatsu Photonics K.K.*, 330 F. Supp. 3d 574,  
 9 609-10 (D. Mass. 2018)). In *WCM Industries*, the alleged infringer argued that “the district court  
 10 erred in refusing to grant judgment as a matter of law of no willfulness because there [wa]s no  
 11 evidence that [the infringer] had knowledge of the patents before the lawsuit began.” *WCM*  
 12 *Indus., Inc. v. IPS Corp.*, 721 F. App’x 959, 970 (Fed. Cir. 2018). The Federal Circuit found  
 13 these “arguments unpersuasive,” noting that there is no *per se* rule requiring knowledge of a  
 14 specific patent for willfulness, emphasizing that willfulness “must be inferred from all the  
 15 circumstances.” *Id.* (citation omitted). Sonos maintains that *WCM*’s rejection of a rigid rule is  
 16 controlling here, as other district courts have concluded. *See, e.g., Illumina*, 2022 WL 899421, at  
 17 \*14 (“Accordingly, knowledge of the specific patents is not required to support a finding of  
 18 willful infringement. Instead, ‘the patentee must show the accused infringer had a specific intent  
 19 to infringe at the time of the challenged conduct’ based on the totality of the circumstances.”  
 20 (citation omitted)). Because the Court has ruled against Sonos on this point, Sonos submits this  
 21 proffer of the testimony that Alaina Kwasizur would have presented had she been permitted to do  
 22 so.

#### 23 **IV. CONCLUSION**

24 As discussed above, Sonos submits this proffer of the testimony of Alaina Kwasizur.  
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1 Dated: May 10, 2023

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